

pending the outcome of the proposal to alter the Table of Allotments — *i.e., at any time prior to the close of the pleading cycle*, the channel is available. Any party may apply for its use.

6. The Commission's statement in the NPRM here is substantially different from that expressed in the cases cited by the Audio Services Division. In the Notice of Proposed Rule Making, *Driscoll, Gregory and Robstown, Texas*, 9 FCC Rcd 3580 (MMB 1994), the Commission stated:

we note that the Commission does not delete [a channel] where an expression of interest is demonstrated by the filing of an application. Therefore, should the Commission receive an acceptable application by the *initial comment deadline* specified herein for Channel 283A at Gregory, Texas, petitioner's proposal to delete Channel 283A at Gregory may be dismissed.

Id., 9 FCC Rcd 3580, 3580 ¶5 (italics added). Although this shorter time frame is not consistent with the public interest in encouraging application for available channels, at least the Commission provided clear notice of its intention to foreclose new applications after the initial comment deadline. The NPRM in the present case did not so limit the possible filing period.

7. Furthermore, the imposition of an arbitrary requirement such as that imposed in this proceeding by the Audio Services Division has, in the present MM Docket 95-83 rulemaking proceeding, no practical benefit in terms of permitting comment on the Benavides "expression of interest" application filing. The Commission, in fact, asked in the docket proceeding for supplemental comments, subsequent to the filing of the Benavides application. Attached hereto as Exhibit B is a copy of the "Request for Supplemental Information", DA 96-725, released May 17, 1996, to determine whether the proposal of TCRVI constituted an impermissible "move-in" toward the larger market of Lubbock, Texas. Therefore, the Commission had every opportunity to call for any additional comment that could have been necessary in response to the Benavides

application at that same time. No one, therefore, could possibly claim to have been foreclosed from commenting in the MM Docket 95-83 proceeding given the timing of the filing of the Benavides application.

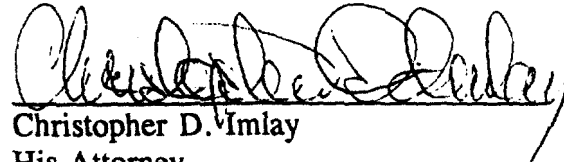
8. Notwithstanding the foregoing, and the Commission's misapplication of its rules and policies relative to the termination of the instant proceeding in the face of the timely filing of the Benavides application, constituting an expression of interest in the retention of the Tahoka channel, the Commission can accommodate both parties' interest, and therefore the matter is potentially academic; Benavides would be willing to substitute Channel 278A for Channel 237A at Tahoka, and amend his application to specify operation on Channel 278A. Benavides is simply not willing for the Commission to delete Channel 237A without substituting Channel 278A at Tahoka, and permitting him to amend his application. Because his filing was timely, no circumstance justifies the deletion of Channel 237A coupled with return of his application.

Accordingly, the foregoing considered, Albert Benavides respectfully requests that the Commission reconsider and reverse the action of the Chief, Audio Services Division, which granted in part the petition to deny of TCRVI, and held the Benavides application in abeyance. Notwithstanding the decision to hold the Benavides application in abeyance, Benavides has been prejudiced by the Commission's action, because if his application had been found to have been timely filed (which in fact it was) relative to the MM Docket 95-83 proceeding, the proceeding would have been terminated and his application granted. Alternatively, the Commission, if it is inclined to proceed with the Notice proposal in that docket, must substitute Channel 278A for Channel 237A at Tahoka, and permit Benavides to amend his application to specify the substituted channel, and retain his cutoff protection. *Report and Order*, Docket No. 94-100, 10 FCC Rcd. at 1017.

Respectfully submitted,

ALBERT BENAVIDES

By:


Christopher D. Imlay
His Attorney

BOOTH FRERET IMLAY & TEPPER, P.C.
1233 20th Street, NW
Suite 204
Washington, DC 20036

December 13, 1996

for

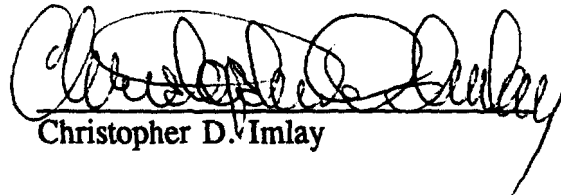
CERTIFICATE OF SERVICE

I, Christopher D. Imlay, certify that a copy of the foregoing PETITION FOR PARTIAL RECONSIDERATION was mailed, this 13th day of December, 1996, to the following:

James L. Primm, Esq.
President and Counsel
21st Century Radio Ventures, Inc.
530 Wilshire Blvd, Suite 301
Santa Monica, CA 90401

*Linda Blair, Chief
Audio Services Division
Federal Communications Commission
1919 M Street
Room 302
Washington, DC 20554

* via hand delivery



Christopher D. Imlay

EXHIBIT 5
REPORT AND ORDER IN DOCKET 95-83

Before the
Federal Communications Comm
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 95-83
Table of Allotments,) RM-8634
FM Broadcast Stations.)
(Littlefield, Wolfforth and)
and Tahoka, Texas))

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 12, 1997

Released: March 21, 1997

By the Chief, Allocations Branch:

1. At the request of 21st Century Radio Ventures, Inc. ("21st Century"), permittee of Station KAIQ(FM), Channel 238C3, Littlefield, Texas, the Commission has before it the Notice of Proposed Rule Making ("Notice"), 10 FCC Rcd 6598 (1995), and Request for Supplemental Information ("RSI"), 11 FCC Rcd 5770 (1996) in this proceeding. Pursuant to the request of 21st Century, the Commission issued the Notice proposing the reallocation of Channel 238C3 from Littlefield to Wolfforth, Texas, and the modification of Station KAIQ(FM)'s construction permit to specify Wolfforth as its community of license. To accommodate this reallocation, the Notice also proposed to delete vacant Channel 237A at Tahoka, Texas, or to substitute Channel 278A for Channel 237A at Tahoka. 21st Century filed comments reaffirming its intention to apply for the channel, if allotted. Emil Macha ("Macha"), licensee of KZZN(AM), Littlefield, Texas, filed comments. Reply comments were filed by Lee W. Shubert, Trustee, ("Shubert"), licensee of Station KLLI(FM), Lubbock, Texas. In response to the RSI, comments were filed by 21st Century, Shubert and Rick McWhorter, Mayor of the City of Wolfforth.

2. Macha filed comments urging the Commission to allot Channel 240C3 to Littlefield, in the event it adopts 21st Century's change of community proposal to reallocate Channel 238C3 from Littlefield to Wolfforth, Texas. Macha states that Littlefield is an incorporated community which includes 6,489 residents who are governed by their own elected city council and mayor. Macha submits that the reallocation of Channel 238C3 to Wolfforth would exclude 17,638 people in the Littlefield area who would have been serviced by Channel 238C3. However, he maintains that number could be reduced to just 675 people if the Commission substitutes Channel 240C3 for Channel 238C3 at Littlefield. Macha states that the allotment of Channel 240C3 to Littlefield would prevent the community from being stripped of its only FM allotment and he intends to apply for Channel 240C3, if allotted.

3. Shubert filed reply comments, noting that 21st Century filed an application for a construction permit for a Littlefield facility in July 1993, which was granted in May of 1994. He states that 21st Century has not constructed its station at Littlefield and believes it has no intention of doing so. He also contends that Macha's newfound expression of interest merits little weight. Shubert argues that absent showing a valid basis for delay, the Commission has required 21st Century to initiate FM service to Littlefield by November 1995. Shubert argues that Macha was nowhere in sight during the five years after the FM allotment to Littlefield was adopted and before 21st Century's application for a construction permit. He contends to permit 21st Century to abandon the allotment at Littlefield in favor of Macha's speculative possibility for local service would clearly disserve the public interest.

4. Following the submission of comments in this proceeding, we issued a RSI, requesting 21st Century to submit information demonstrating that Wolfforth is deserving of a first local service preference. We stated in the RSI that we had reexamined our policy regarding reallocation proposals that involved a station seeking to reallocate its channel from a rural community to another community that was located closer to but outside of an Urbanized Area. Our new policy requires that proponents seeking to relocate to a community adjacent to an urbanized area must place a 70 dBu signal over 50% or more of the urbanized area must submit a Tuck analysis. See Headland, Alabama and Chattahoochee, Florida ("Headland, Alabama"), 100 FCC Rcd 10352 (1995). In this case, our engineering staff determined that the reallocation of Channel 238C3 would provide a 70 dBu signal to half of the Lubbock Urbanized Area. The RSI requested 21st Century to direct its response to the factors for determining independence as enumerated in KFRC and Tuck to determine whether Wolfforth warrants a first local service preference.

5. In response, 21st Century contends that, based on its engineering analysis, the predicted 70 dBu signal for KAIQ(FM) at Wolfforth will encompass only 45.4% of the Lubbock Urbanized Area, and thus the showing required pursuant to Headland, Alabama is not applicable. In any event, 21st Century has submitted information, using the criteria set forth in KFRG and Tuck, regarding the independence of Wolfforth from the Lubbock Urbanized Area. 21st Century argues that the first criterion, signal population coverage, is not relevant in this case since less than half the Lubbock Urbanized Area will be served by Station KAIQ(FM). As to the second criterion, it maintains that Wolfforth is a sizeable rural community with 1,941 people while Lubbock contains approximately 186,206 people. 21st Century states that Wolfforth is located approximately eight kilometers outside of the city limits of Lubbock, separated by open rural area and farm land. As to the third criteria concerning the interdependence between the smaller community and the central city, 21st Century submits that Wolfforth has its own local government, elected officials, zip code, its own section in the GTE phone book, Chamber of Commerce, and a separate advertising market. 21st Century also submits that many residents work in Wolfforth, noting its phone book lists over one hundred individual businesses within the city itself. Wolfforth maintains its own city financed police department and a fifteen-member volunteer fire department. 21st Century reports that the city provides water and sewer services to its residents. With respect to other municipal services, it states that Wolfforth has its own independent school district with 4,000 students, a city library, city park and a new municipal building which houses the city administrative offices. 21st Century urges, on the basis of the information presented, that even though the city is somewhat physically close to Lubbock, the application of the Tuck factors to Wolfforth clearly determines the independence of Wolfforth from Lubbock, and Wolfforth deserves to receive its first local service.

6. Shubert filed comments opposing 21st Century's proposal and contends that Wolfforth should not be awarded a first local service preference. He argues that Wolfforth is clearly interdependent with Lubbock, which has a plethora of local broadcast outlets already. In this regard, he notes that the Commission has "consistently given little or no weight to claimed first local service preferences if, given the facts and circumstances, the grant of a preference would appear to allow an artificial or purely technical manipulation of the Commission's 307(b) related policies" citing Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License ("Community of License R4O"), 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094, 7096 (1990) ("Community of License MO4O"). He contends that Wolfforth does not qualify as an independent community from the Lubbock Urbanized Area using the factors for determining independence as enumerated in KFRG and Tuck. Shubert claims petitioner's proposed facility would place a 1 mV/m signal over the entirety of Lubbock. Second, Wolfforth is dwarfed by nearby Lubbock, a city almost one hundred times its size that is only three miles away. Shubert argues that Wolfforth is clearly an integral part of the Lubbock metropolitan area, noting that the community has no airport, hospital, newspaper or local media that is distinct from Lubbock. He claims that Wolfforth's advertising market and political identity is indistinguishable from Lubbock. Shubert also advises that Wolfforth city employees confirmed that at least half of its residents commute to Lubbock, that there are not intracity transportation services, and commercial bus lines do not pick up passengers in Wolfforth. In contrast, Shubert describes Littlefield as an independent city with its own local government, school district, police and fire department, municipal airport, post office, banks, hospital, newspaper and many businesses. Shubert states the Commission should not allow 21st Century to abandon its commitment to construct a Littlefield station in search of a more populous market in the Lubbock suburbs. He maintains that 21st Century has filed for extension of its Littlefield permit, claiming that circumstances beyond its control had delayed construction. However, Shubert believes these circumstances are simply 21st Century's own voluntary attempts to reallocate its station to the Lubbock suburbs. Shubert maintains that the Commission should not endorse this "artificial or purely technical manipulation" of its rules and policies, citing Community of License MO4O. He further advises that in a case presently pending before the Commission involving 21st Century, the Commission indicated that the "theoretical" nature of the service lost to a small community may still offset the equally theoretical "gain" to an already well-served suburb of an urbanized area. See Sibley, Iowa and Brandon, South Dakota, 11 FCC Rcd 3635 (1996). Shubert believes adoption of 21st Century's proposal is inconsistent with the principles of bringing service to outlying communities underlying Section 307(b) of the Communications Act.

7. Discussion At the outset, it is necessary to dismiss Macha's proposal to allot Channel 240C3 to Littlefield. In doing so, we recognize that the allotment of Channel 240C3 to Littlefield could replace some of the potential loss of service at Littlefield; however it is Commission policy not to accept a proposal that is contingent upon final approval of changes involving other broadcast facilities. See Cut and Shoot, Texas, 11 FCC Rcd 16383 (1996). In this case, Channel 238C3 must be allotted to Wolfforth in order to accommodate Channel 240C3 at Littlefield. Furthermore, we find Macha's proposal is beyond the scope of this proceeding and, it would, therefore, violate the Administrative Procedure Act to allot Channel 240C3 to Littlefield. While it is well established that a final rule may vary from what was originally proposed, see Cleveland and Ebenezer, Mississippi, 8 FCC Rcd 8554 (1993) recon. denied, 10 FCC Rcd 8807 (1995), and Sonthampton, Bridgehampton, Westhampton and Calverton-Roanoke, New York, 7 FCC Rcd 4412 (1992),

appl. for rev. denied, 10 FCC Rcd 11516, (1995), we cannot allot Channel 240C3 when we explicitly stated in the Notice that we were not proposing to do so.

8. Having made that decision, we can now address the merits of 21st Century's reallocation proposal. In doing so, we have confirmed 21st Century's engineering study that Channel 238C3 at Wolfforth will place a 70 dBu signal over less than 50% of the Lubbock, Texas, Urbanized Area. Thus, this case does not present the policy concerns expressed in Headland, supra. Nevertheless, an examination of the Tuck factors supports a finding that Wolfforth is sufficiently independent of Lubbock so that the transmission services licensed in the Lubbock Urbanized Area should not be attributed to Wolfforth. As already noted, Station KAIQ(FM) will place a 70 dBu signal over less than 50% of the Lubbock Urbanized Area. As for size and proximity, Wolfforth has a 1990 census population of 1,941 persons and is about eight kilometers from the edge of the Lubbock Urbanized Area ("population 187,906"). As to the third criteria of interdependence, we find that Wolfforth is not dependent upon the Urbanized Area for its existence. Wolfforth is an incorporated community with a mayor and city council. 21st Century has provided a letter from Wolfforth's Mayor affirming that the city provides its own municipal services to its citizens such as police and fire protection, EMS medical service, water, trash, and sewer services. In addition, the mayor states the city has a new municipal building which houses the police department, municipal court, and the city library. The city also has its own independent school system and city park which includes a four-field baseball complex, basketball courts, a sand volleyball court, soccer and football areas, a lake, playground and picnic areas. The telephone listings for Wolfforth are published by the GTE Southwest Incorporated. While listings for other communities are included in the same telephone book, the listings for Wolfforth are separate from the other communities and Lubbock is not a part of the telephone book. Wolfforth also has its own post office and zip code, separate from that of Lubbock. Wolfforth also has numerous businesses, religious and civic organizations which identify themselves with the community as is evidenced by the listings in the telephone. While Shubert points out that the community has no airport, hospital or newspaper, we find that on balance that Wolfforth should be treated as a separate community.

9. Next, we must determine whether the instant proposal would result in a preferential arrangement of allotments pursuant to the Commission's change of community procedures. See Community of License MO&O, supra, and Revision of FM Assignment Policies and Procedures. Based on past precedent, we would normally favor a first local service to Wolfforth over retaining a second local service at Littlefield. However in this case, we find that the reallocation of Channel 238C3 from Littlefield to Wolfforth and the modification of Station KAIQ(FM)'s authorization would not be in the public interest. In making this determination, we find that retaining Channel 238C3 at Littlefield would trigger priority two of the Commission's FM allotment priorities because, based upon our engineering analysis, 3,113 persons would receive a second full-time aural service if the station were built. By way of contrast, the proposed reallocation of Channel 238C3 from Littlefield to Wolfforth triggers priority 3 since Wolfforth (population 1,941) would be provided with its first local aural transmission service priorities 2 and 3 are co-equal, the tie breaking mechanism is population. Using this criterion, we note that the number of people that could receive a second aural service (3,113) is greater than the population of Wolfforth (1,941), which would receive a first local transmission service. (Under these circumstances, we believe that the public interest is better served by providing a second reception service to a larger population than providing a first local aural transmission to Wolfforth.) Moreover, all the residents of Wolfforth receive service from five or more full-time aural services. Our view is further buttressed by the fact that 411 persons will receive a first aural reception service, thereby eliminating a white area. Based on our decision, we need not delete Channel 237A, Tahoka, Texas, or in the alternative substitute Channel 276A for Channel 237A at Tahoka to accommodate 21st Century's reallocation proposal. We will serve a copy of this Report and Order on the applicant for Channel 237A at Tahoka. We also find that the issue raised by Shubert concerning 21st Century's reason for not building a station at Littlefield is speculative and that there is no extrinsic evidence to support this allegation, which is now moot.

10. Accordingly, IT IS ORDERED, That the petition for rule making submitted by 21st Century Radio Ventures, Inc., to reallocate Channel 238C3 from Littlefield to Wolfforth, Texas, IS DENIED.

11. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Report and Order by Certified Mail, Return Receipt Requested, to the following:

Albert Benavides
4821 73rd Street
Lubbock, Texas 79424
(Applicant for Channel 237A at Tahoka, Texas)

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

EXHIBIT 6
CONSTRUCTION PERMIT OF KAIQ(FM)

United States of America



FEDERAL COMMUNICATIONS COMMISSION
FM BROADCAST STATION CONSTRUCTION PERMIT

Official Mailing Address:

21ST CENTURY RADIO VENTURES, INC.
9222 LOMA ST
VILLA PARK, CA 92667

Authorizing Official:

Dale E. Bickel
Supervisory Engineer, FM Branch
Audio Services Division
Mass Media Bureau

Grant Date:

19 MAY 1994

Call sign: 930726MB

This permit expires 3:00 am.
local time 18 months after
grant date specified above

Permit File No.: BPH-930726MB

Subject to the provisions of the Communications Act of 1934, as amended, subsequent acts and treaties, and all regulations heretofore or hereafter made by this Commission, and further subject to the conditions set forth in this permit, the permittee is hereby authorized to construct the radio transmitting apparatus herein described. Installation and adjustment of equipment not specifically set forth herein shall be in accordance with representations contained in the permittee's application for construction permit except for such modifications as are presently permitted, without application, by the Commission's Rules.

This permit shall be automatically forfeited if the station is not ready for operation within the time specified (date of expiration) or within such further time as the Commission may allow, unless completion of the station is prevented by causes not under the control of the permittee. See Sections 73.3598, 73.3599 and 73.3534 of the Commission's Rules.

Equipment and program tests shall be conducted only pursuant to Sections 73.1610 and 73.1620 of the Commission's Rules.

Name of permittee:

21ST CENTURY RADIO VENTURES, INC.

Station Location:

TX-LITTLEFIELD

Frequency (MHz): 95.5

Channel: 238

Class: C3

Call sign: 930726MB

Permit No.: BPH-930726MB

Hours of Operation: Unlimited

Transmitter location (address or description):

WEST SIDE OF S.R. 1490, 9 KM NORTH OF S.R. 597; SW OF
LITTLEFIELD, LAMB COUNTY, TEXAS.

Transmitter: Type accepted. See Sections 73.1660, 73.1665 and 73.1670
of the Commission's Rules.

Transmitter output power: As required to achieve authorized ERP.

Antenna type: (directional or non-directional): Non-directional

Antenna coordinates: North Latitude: 33 52 2.0
West Longitude: 102 24 12.0

	Horizontally Polarized Antenna	Vertically Polarized Antenna
Effective radiated power in the horizontal plane (kW) :	25.0	25.0
Height of radiation center above ground (meters) :	31.0	31.0
Height of radiation center above mean sea level (meters) :	1110.0	1110.0
Height of radiation center above average terrain (meters) :	35.0	35.0
Overall height of antenna structure above ground (including obstruction lighting, if any) :	34.0 meters	

Obstruction marking and lighting specifications for antenna
structure:

It is to be expressly understood that the issuance of these specifications
is in no way to be considered as precluding additional or modified marking
or lighting as may hereafter be required under the provisions of Section
303(q) of the Communications Act of 1934, as amended.

None Required

Call sign: 930725MB

Permit No.: BPH-930725MB

Special operating conditions or restrictions:

1. The permittee/licensee must reduce power or cease operation as necessary to protect persons having access to the site, tower or antenna from radiofrequency radiation in excess of FCC guidelines.

2. Permittee has specified use of a Shively 6810 2-bay antenna to demonstrate compliance with the ANSI radio-frequency radiation limit. If any OTHER type or size of antenna is to be used with the facilities authorized herein, the automatic program test provisions of 47 CFR Section 73.1620 will NOT apply.

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In THAT case, a formal request for program test authority must be filed in conjunction with the FCC Form 302-FM application for license before program tests will be authorized. This request should be made at least 10 days prior to the date on which program tests are desired to commence. The request must include a revised radio-frequency radiation showing to demonstrate continued compliance with the ANSI limit. Documentation demonstrating compliance with the ANSI radiofrequency radiation limit may be submitted in advance of the filing of FCC Form 302-FM. The Commission's staff will review it for compliance and respond by letter stating whether automatic PTA has been reinstated.

**UNITED STATES OF AMERICA
FEDERAL COMMUNICATION COMMISSION
EXTENSION OR REPLACEMENT OF CONSTRUCTION PERMIT
FM**

**Call Sign: KAIQ
Location: LITTLEFIELD, TX
File No: BMPH-960703JC**

**Grant Date: February 21, 1997
Expiration Date: August 21, 1997**

**21ST CENTURY RADIO VENTURES, INC.
9222 LOMA ST
VILLA PARK, CA 92667**

The Authority contained in Authorization File No. BPH-930726MB (underlying construction permit), which was granted on May 19, 1994, is hereby granted an extension of time to construct.

The modification of construction permit shall be attached to and be made a part of the construction permit of this station.

Except as herein expressly modified, the above-mentioned construction permit, subject to all modifications heretofore granted by the Commission, is to continue in full force and effect in accordance with the terms and conditions thereof and for the period therein specified.

**FEDERAL
COMMUNICATIONS
COMMISSION**



ISSUED BY: BDEUTSCH

F.C.C. WASHINGTON, D.C.

**FCC Form 361
October 1978**